No. 11126

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

CHARLES H. CARR,
United States Attorney,

ROBERT E. WRIGHT,
Assistant United States Attorney,

LILLICK, GEARY, MCHOSE & ADAMS,
AUGUSTUS F. MACK, JR.,

634 South Spring Street, Los Angeles 14,

Proctors for Appellant.

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In replying to appellee's brief appellant will only deal with such features as seem to require comment, believing that appellant's theory and argument of the case were fully expounded in its opening brief.

I.

Private Carriage Was Involved and the Contract Between the Parties Affords a Full Defense to Appellant.

The complete answer to points I and II of appellee's brief, viz.,

> I. The Carriage of Goods by Sea Act Governed the Rights and Duties of the Parties, and Appellant Was Liable for a Breach of Such Duties (pp. 4-14).

II. Even if the Carriage of Goods by Sea Act Had Not Been Made a Part of the Contract of the Parties, Appellant, Was Nevertheless Liable for a Breach of Its Duties as Bailee for Hire Despite Paragraph 19 of the Charter Party (pp. 15-23).

is that the carriage was *private* and the parties were free to contract as they chose; the contract was the charter party, Form 104, which never incorporated the Carriage of Goods by Sea Act and consequently the Act does not apply to the shipment in question. The argument on this score is found at pages 10-22 of appellant's brief and does not require repeating at length here.

The situation is then one of appellant being a bailee of goods for hire *under a written contract, i. e. the charter party made between the parties, which contract governed their respective rights and liabilities.* There is a vast difference between a simple bailment for hire, and a bailment for hire pursuant to a written contract, for the reason that it has been the law for some hundreds of years that the parties to a bailment for hire may contract as they choose about their respective rights and liabilities. Thus, parties to a private contract of carriage may agree that the carrier shall be exempt from liability for its own negligence. Authorities such as *The Fri,* 154 Fed. 333 (2 C. C. A. 1907), cited in appellant's brief (pp. 15, 16) and certain of the authorities cited by appellee like *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U. S. 104, 86 L. Ed. 89 (1941) clearly enunciate the rule. In the latter case the Supreme Court of the United States said at page 110 of 314 U. S.:

"Petitioner apparently does not challenge the distinction which for more than two centuries since

> Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Reprint 107, *supra,* has been taken between common carriers and those whom the law leaves free to regulate their mutual rights and obligations by private arrangements suited to the special circumstances of cases like the present. Nor do we see any adequate grounds for departing from it now or for drawing distinctions between a private bailment of merchandise on a barge in New York Harbor and of goods stored in a private warehouse on the docks. Neither bailee is an insurer of delivery of the merchandise; both are free to stipulate for such insurance or for any lesser obligation, in which case the bailor cannot recover without proof of its breach."

It follows that there is no liability upon appellant if the terms of the charter party afford a defense to appellant. Paragraph 19 affords such defense.

Before discussing paragraph 19 further it is interesting to note that a late decision, *Romano, et al. v. West India Fruit & Steamship Co., Inc.,* 151 F. (2d) 727 (5 C. C. A., decided November 14, 1945), is a very recent authority on the proposition that where a private contract of carriage is involved the bill of lading is merely a receipt and not a contract. The Court said at page 730:

> "The owner's reliance on Par. 12 of the bill of lading, declaring that the carrier shall not be charged with deviation under conditions there set out, will not at all do. In the first place, where a bill of lading is issued by the master to a charterer who has contracted for the full capacity of the ship, the bill of lading is merely a receipt and not a contract, and its provisions cannot affect or modify the liability of the ship."

Paragraph 19 (quoted verbatim at page 23 of appellant's brief and at pages 10-11 of the appendix) states that the vessel "shall not be responsible for . . . *any consequences arising out of shipping more than one grade of cargo.*" (Emphasis ours.) Let us examine the plain meaning of these plain words somewhat more closely. The principal and perhaps the only "consequence arising out of shipping more than one grade of cargo" coming to mind is that of *contamination.* The very thought or nature of contamination of mixing the products implies in itself negligence or carelessness on the vessel somewhere along the line. Somebody on the vessel mistakenly turns or opens the wrong valve and lo!—there is a mess! Commercially speaking, gasoline and diesel oil do not mix nor do any other high gravity and low gravity petroleum products.

Appellant wanted to protect itself in the event of any negligence or conduct on the part of its employees or the vessel resulting in contamination of different grades of cargo and that is the reason such provision was made in paragraph 19. If but one grade of cargo be carried it can be run from one tank to another and from one pipeline to another with impunity; but when more than one grade of cargo be carried the burden on the carrier is very much greater, having in mind the complicated system of valves and piping on a Swan Island tanker such as the Egg Harbor. One turn of the wrong valve can mean a catastrophe.

There is no conflict between the plain meaning and intent of paragraph 19 and other provisions of the charter party as suggested by appellee in its brief at pages 22 and 23. Paragraph 19 simply relieves appellant from liability in a particular situation apt to occur on a tanker where more than one grade of cargo is carried, *i. e.* contamination. Nor does it follow as contended at page 18 of appellee's brief that the single fact that more than one

product is carried would in every case relieve the carrier from liability or damage to either product no matter how such damage occurred. The charge in this case throughout has been negligence and lack of due diligence. There is no charge or contention that appellant *wantonly or wilfully* contaminated the two grades of cargo.

II.

Damages Are Limited to Contamination Only on the S. S. Egg Harbor, if Appellee Is Entitled to Recover.

Appellee claims that it is entitled to damages for contamination on both ship and shore and cites a number of cases which may be referred to as "fraudulent sale" cases. One of the principal cases cited is *Dushane v. Benedict,* 120 U. S. 630, 30 L. Ed. 810 (1887). A rag dealer sold a quantity of rags to a paper maker and falsely represented that they were clean and free from infection. When the rag dealer sued to recover the purchase price, a defense was set up for damages for breach of plaintiff's agreement to sell the rags free from infection. It further appears from the context of the case that the rag dealer knew that the rags were to be applied to a particular purpose, *i. e.* making paper. The Court said at page 637 of 120 U. S.:

> "The damages recoverable for a breach of warranty, or for a false representation, include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act. For instance, if a man sells hay or grain for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. French

v. Vining, 102 Mass. 132; Wilson v. Dunville, 4 L. R. Ir. 249, and 6 L. R. Ir. 210. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals; either in an action of tort for the false representation (Mullett v. Mason, L. R. 1 C. P. 559; Jeffrey v. Bigelow, 13 Wend. 518; Faris v. Lewis, 2 B. Mon. 375; Sherrod v. Langdon, 21 Iowa, 518; Marsh v. Webber, 16 Minn. 418); or in an action on the warranty, either in tort (Packard v. Slack, 32 Vt. 9; Smith v. Green, 1 C. P. D. 92), or even in contract (Black v. Elliott, 1 Fost. & Fin. 595. See also Randall v. Newson, 2 W. B. D. 102)."

Of similar import are the animal cases like *Marsh v. Webber*, 16 Minn. 375 (1871) and *Jeffrey v. Bigelow*, 13 Wend. 518 (1835) cited in the quotation above from *Dushane v. Benedict*. These cases are distinguishable from the case at bar in that a fraudulent sale was involved and the context of the decisions shows that the seller sold with knowledge of the purpose for which the goods were to be used.

The case of *Davis v. Clement Grain Co.*, 251 S. W. 545 (Tex. Civ. App. 1923) involved a claim for damage to some hay in a box car. Part of the hay was ruined by water coming in through a leaky roof and the rest of the hay in the car was damaged. This case presents a picture where damage occurred to the hay on a partial total basis and a partial basis while all in the control of the carrier and is thus distinguishable from the case at bar.

Appellee also cites the recent case of *Armco International Corp. v. Rederi A/B Disa*, 151 F. (2d) 5 (2 C. C.

A. 1945). A careful reading of that case, it is respectfully submitted, will show that in discussing damages it went off on the question of burden of proof. Iron plates were discharged from the vessel at Buenos Aires, loaded onto railroad cars, and the railroad carried them a short distance to a warehouse where they were stacked. The Court said at page 9:

> "Since there is nothing to charge the consignee until the plates were stacked in the warehouse, and since some part at least of the damage to the plates from holds numbers one and two probably occurred during that time, the ship failed to prove *how much* of the damage was caused by any negligence chargeable to the consignee. That alone is enough to charge her all the damage." (Emphasis ours.)

In the case at bar it is very definite what damage occurred on shore and what occurred on the ship. There is no area of uncertainty as in the *Armco* case, which uncertainty put the loss on the ship because it could not prove otherwise.

Paragraph 7 of the charter party provided in part as follows:

> "7. Pumping In and Out.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, *and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.*" (Emphasis ours.)

Appellant contends that *as a matter of contract* between the parties, liability for any damage terminated once the cargo went over the side; paragraph 7 was intended to

limit damages in the event liability were established to the cargo on board the ship. The reason is clear—the vessel had no control over anything that transpired once the cargo went over its side and it is respectfully submitted that a reasonable construction of paragraph *7 as the contract between the parties* impels the conclusion that damages are to be limited to those occurring on board ship in the event liability be established.

Appellant was neither overstating anything nor being ethereal nor figurative in its reference to and example of the "dire consequences" of charging appellant for damages to contents already in the shore tanks if liability be established. *We have such a dire consequence right in this case.* 8140 barrels of gasoline were contaminated on the Egg Harbor. *11,339* barrels of uncontaminated gasoline were stated by appellee to be in shore tank 62. Appellee wants damages for both, *the contents of shore tank 62 being 139 per cent more than the contaminated 8140 barrels on the vessel.* It might just as well have been 200 per cent more, 300 per cent more, or 500 per cent more—it is simply a matter of degree. It could even be far worse with diesel oil which, according to Mr. Kilbourn, is far more easily contaminated than gasoline.

Appellee says that appellant ". . . had every reason to foresee the possibility that upon arrival, such products would be discharged into shore tanks which already contained like products" (p. 26). What's fair for one is fair for two, and accordingly, appellee had every reason to foresee the possibility that there might be some contamination on board the vessel. *In addition, however, as far as appellee is concerned,* it was the one who had the sole control over the products once they left the ships' side and it was the only one *who knew where they were going and who could do with them as it pleased.* Appellant respect-

fully submits that if both appellant and appellee are chargeable with foreseeing the possibilities above mentioned, appellee additionally having the sole control over the handling of the products once they left the ship's side, the loss and any damage to the contents of shore tanks should fall on appellee.

Conclusion.

The parties were free to contract as they wished. They contracted for the carriage of more than one grade of cargo. The grades became mixed somehow but in all events through no wilful or wanton act of appellant. The resulting situation was clearly a "consequence arising out of shipping more than one grade of cargo" for which appellant was not responsible under paragraph 19 of the contract.

The decree should be reversed.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney,

ROBERT E. WRIGHT,
Assistant United States Attorney,

LILLICK, GEARY, MCHOSE & ADAMS,
AUGUSTUS F. MACK, JR.,

Proctors for Appellant.